RECORD AND BRIEFS

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No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON THE EXCEPTION BY THE UNITED STATES TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

SUR-REPLY BRIEF FOR THE UNITED STATES

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The States of New Mexico and Colorado have filed briefs opposing the United States' exception to the Special Master's recommendation that the United States' complaint in intervention should be dismissed to the extent that it asserts claims under the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785. New Mexico and Colorado contend that the United States cannot bring suit based on alleged violations of the Compact because it is not a signatory to the Compact (N.M. Reply Br. 6-11; Colo. Reply Br. 2-3); that any claims the United States has against New Mexico must instead be based on the Convention Between the United States and Mexico Providing For the Equitable Distribution of Waters of the Rio Grande For Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953, and other laws (N.M. Reply Br. 11-18; Colo. Reply

Br. 3-6); that the United States is not a third-party beneficiary of the Compact (N.M. Reply Br. 29-32; Colo. Reply Br. 10-13); and that the United States' intervention in this case could lead to a circumvention of state law and of a general adjudication of water rights in the lower Rio Grande currently pending before a New Mexico state court (N.M. Reply Br. 32-36).

Those contentions should be rejected. The United States intervened in this case to assert specific federal interests that are reflected in and protected by the Compact, as it has done in other interstate compact disputes. For the same reasons that the United States can enforce the statutory protections for federal interests provided in the Compact, the United States can also enforce the Compact under contract principles as a third-party beneficiary. The United States' request for relief against New Mexico seeks a ruling by this Court regarding New Mexico's obligations under the Compact, insofar as they affect the operation of the Rio Grande Project (Project) and the United States' obligations to deliver water from that Project, including to Texas and Mexico. Those Compact obligations are binding on New Mexico citizens and must be respected by the state water adjudication court.

A. The United States May Obtain Declaratory And Injunctive Relief Against New Mexico For Violations Of The Rio Grande Compact

1. New Mexico (Reply Br. 6-9) and Colorado (Reply Br. 2-3) contend that the Compact's status as a federal law as a result of Congress's approval pursuant to the Compact Clause, U.S. Const. Art. I, § 10, Cl. 3, does not mean that the United States can enforce the Compact against the signatory States. But the United States is

not claiming a broad right to intervene in every case involving an interstate compact. Nor does the United States contend, as New Mexico suggests (Reply Br. 9-11), that it may bring suit to enforce an interstate compact simply because a federal representative participated in compact negotiations. The United States' ability to seek declaratory and injunctive relief for New Mexico's violations of the Compact is based on specific federal interests protected by the Compact. See U.S. Exception Br. 34-40. Congressional ratification of the Compact, which expressly incorporates the federal reclamation Project, and the United States' participation in the Compact negotiations at the direction of Congress and for the purpose of representing the 1906 Treaty and the Project, see U.S. Exception Br. 12-13, reinforce the conclusion that the Compact protects specific federal interests.

New Mexico contends (Reply Br. 4) that the United States' request for declaratory and injunctive relief that would require New Mexico to comply with its Compact obligations "threatens to massively expand the United States' authority over interstate compacts." In New Mexico's view (Reply Br. 24), the United States, by intervening in this case, seeks to "claim for itself a central role in the administration and enforcement of the Compact." Those concerns are unfounded.

This Court's precedents make clear that intervention of the United States is warranted where "distinctively federal interests, best presented by the United States itself, are at stake" in an interstate dispute. *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). The United States has set forth those federal interests in detail. See U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 4-9; U.S. Exception Br. 36-40. In short, the

United States has an interest in ensuring that the Compact is interpreted to require New Mexico to curtail diversions of surface water and hydrologically connected groundwater in New Mexico below Elephant Butte Reservoir to the extent those diversions interfere with Project deliveries that fulfill the United States' treaty obligation to Mexico and complete the Compact's apportionment to Texas and lower New Mexico. See U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 5-8. Such diversions would decrease water available to the Project and undermine the United States' calculation and delivery of contractual diversion allocations between the water districts in Texas and New Mexico. *Ibid.*; U.S. Exception Br. 10-12 (describing 1938 contract with irrigation districts in New Mexico and Texas providing for a 57%-43% split of Project deliveries based on irrigable acreage in each district and the 2008 Operating Agreement between the United States and the water districts).

New Mexico has recognized that the United States' interest in operating the Project pursuant to those contracts is directly implicated here. Indeed, New Mexico initially resisted the filing of Texas's complaint on the ground that participation by the United States was required to resolve the dispute. N.M. Br. in Opp. 31-34. It explained that "the entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the Project," because "[t]he United States is ultimately responsible for release and delivery of Project water to specific diversion and delivery points in both New Mexico and Texas." *Id.* at 33.

The United States also has an interest in ensuring that the Compact is not interpreted to allow New Mexico water users to intercept or interfere with the delivery of Project water to Mexico to fulfill the obligation of the United States to deliver 60,000 acre-feet of water per year to Mexico pursuant to Article I of the 1906 Treaty, 34 Stat. 2953. See U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 8-9. That is both because uncapped use of water by non-Project water users below Elephant Butte Reservoir could reduce Project efficiency to a point where the United States could not meet its delivery obligation, and because Article II of the 1906 Treaty links the quantity of water that the United States must deliver to Mexico during an extraordinary drought to the quantity of surface water delivered to irrigation districts in the United States. *Ibid.* (citing 1906 Treaty, Article II, 34 Stat. 2954).[1]

Those interests are properly protected by the United States in this suit, and the United States has carefully tailored the relief it seeks to the specific interests it has intervened to protect. It has asked the Court to declare

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[1] In previous suits brought by Texas to enforce the Rio Grande Compact, New Mexico and Colorado took the position that the United States was a required party in light of its treaty obligation to Mexico. In *Texas* v. *New Mexico*, No. 9, Orig., New Mexico argued that "[n]o decree may be entered determining or enforcing the rights of Texas or New Mexico arising out of the Rio Grande Compact without making a provision to assure the delivery of water to fulfill the obligations of the United States under the [1906 Treaty]." N.M. Answer at 16, *Texas* v. *New Mexico*, No. 9, Orig. (filed Aug. 23, 1952). Colorado made the same argument in *Texas* v. *Colorado*. See Colo. Answer at 5, *Texas* v. *Colorado*, No. 29, Orig. (filed Feb. 9, 1968). Those States thus have directly linked the declaration of rights and obligations under the Compact with protection of the federal treaty obligation.

that, as a party to the Compact, New Mexico (i) may not permit water users who do not have contracts with the Secretary to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico; (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts; and (iii) must affirmatively act to prohibit or prevent such interception or interference. U.S. Compl. 5. The United States has requested injunctive relief to the same effect. *Ibid.* New Mexico's concern (Reply Br. 8, 24) that the United States is seeking a radical expansion of its power to enforce interstate compacts as a general matter is thus unfounded. New Mexico points to no instance in which the United States has sought to assert federal interests protected by an interstate compact other than as an intervenor in an already-pending dispute between States, and questions concerning such an action are not presented here.

2. New Mexico observes (Reply Br. 11) that the United States is "an express party and signatory" to other interstate compacts, and it suggests that the United States' non-signatory status to the Rio Grande Compact "confirms [that] the Compact was not intended to confer any rights or protections on the United States." That suggestion is incorrect. The compacts identified by New Mexico—the Delaware River Basin Compact, Act of September 27, 1961, Pub. L. No. 87-328, 75 Stat. 688, and the Susquehanna River Basin Compact, Act of December 24, 1970, Pub. L. No. 91-575, sec. 1, 84 Stat. 1509—are compacts that create regional agencies of federal and state representatives to "encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of [a] basin." Delaware River Basin

Compact, Art. 1, Sec. 1.3(e), 75 Stat. 690; Susquehanna River Basin Compact, Art. 1, Sec. 1.3(5), 84 Stat. 1512 (same). Those compacts are different from interstate compacts that apportion water of an interstate stream among States, and they do not shed any light on Congress's intent in approving the Rio Grande Compact decades earlier. See *Texas* v. *New Mexico*, 462 U.S. 554, 565 (1983) (congressional intent may be informed by "[o]ther interstate compacts, approved by Congress contemporaneously"). New Mexico identifies no interstate apportionment compact to which the United States is a party, and yet the United States has been permitted to intervene as a plaintiff in other compact cases to assert and protect federal interests that are implicated by those compact disputes. U.S. Exception Br. 38-42.

New Mexico contends (Reply Br. 21-22) that in *Texas* v. *New Mexico*, No. 65, Orig., the United States intervened "simply to protect other federal interests, not to assert a * * * cause of action arising from a compact." New Mexico bases that contention on the United States' prayer for relief in its complaint, which requested "such relief as is appropriate and necessary to protect the United States' rights with respect to the waters of the Pecos River stream system." U.S. Compl. in Intervention at 9, *Texas* v. *New Mexico*, No. 65, Orig. (filed Aug. 20, 1975). In the present controversy, the United States' request for relief is more specific as to how the Court can shape declaratory and injunctive relief to protect the United States' interests, but that does not make the request for relief inappropriate or suggest that the United States' claim for relief in the Pecos River dispute was not a request for the Court to enter relief based on the compact. The United States' request

for relief in the Pecos River case—relief "appropriate and necessary to protect [its] interests," including the protection of a treaty obligation to deliver water to Mexico, see U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10-11, *Texas* v. *New Mexico*, *supra* (No. 65, Orig.)—could readily encompass a declaration that the States must comply with their compact obligations.

New Mexico further contends (Reply Br. 23-24) that in *Texas* v. *Colorado*, No. 29, Orig., the United States did not suggest that it sought relief under the Compact when it intervened as a plaintiff and requested "that its rights with respect to the waters of the Rio Grande stream system be fully recognized and protected by the Court." U.S. Compl. in Intervention at 5, *Texas* v. *Colorado*, No. 29, Orig. (filed Apr. 19, 1968). To the contrary, the United States explained that it was intervening because it "recognize[d] that the Compact may be construed, reformed or held unenforceable * * * so as to affect federal interests adversely," U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 7, *Texas* v. *Colorado*, *supra* (No. 29, Orig.), and it set forth in the complaint its view that the United States' interests would "be protected by compliance with [the Compact's] terms," U.S. Compl. in Intervention ¶ VI, *Texas* v. *Colorado*, *supra* (No. 29, Orig.). The request for relief in that case clearly contemplated relief that would require the States to comply with their compact obligations.

New Mexico (Reply Br. 25-28) and Colorado (Reply Br. 8-9) also attempt to distinguish *Nebraska* v. *Wyoming*, 507 U.S. 584 (1993), where the United States was granted summary judgment on claims to protect "its longstanding diversion and storage practices" and to es-

tablish the priority date for its reservoirs under an equitable apportionment decree that apportioned no water to the United States. *Id.* at 594; see U.S. Exception Br. 42-45. New Mexico argues that the Court's characterization of the United States' claims as raising "an enforcement issue," 507 U.S. at 592, does not mean that the United States "has free-roving authority to enforce apportionment decrees and interstate compacts as it sees fit." N.M. Reply Br. 26. The United States is not asserting or seeking such authority here. See pp. 2-6, *supra*. But *Nebraska* v. *Wyoming* remains an example relevant to this case. The Court there permitted the United States to protect federal interests in an action to enforce an equitable apportionment decree, even though the United States did not itself receive an apportionment of water under the decree, because the Bureau of Reclamation's (Reclamation) practice of storing water in its reservoirs was "necessary to ensure the delivery of the 46,000 acre-feet of water [to Nebraska] envisioned in the apportionment." 507 U.S. at 595.

3. The basis for the United States' intervention in this case—to protect federal interests that are threatened by New Mexico's violation of the Compact—is neither unusual nor an attempt to expand the United States' role in enforcing interstate compacts. New Mexico observes (Reply Br. 19-21), as did the Master (First Interim Report of the Special Master (Rep.) 220), that the United States often participates in original actions as amicus curiae. That observation has no bearing on the propriety of the United States' intervention in this case. In any original action, the United States evaluates how its interests are implicated in the dispute and decides whether to participate at all—and if so whether to participate as amicus curiae or to submit to the

Court's jurisdiction by seeking leave to intervene as a party. Consistent with New Mexico's assertion that the United States' interests are so squarely implicated here that the case could not proceed unless the United States intervened, N.M. Br. in Opp. 31-34, the United States concluded that the best course was to subject itself to the Court's jurisdiction by seeking leave to intervene, so as to permit a full resolution of the dispute. U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 10. Identifying the federal government's interests that are at stake and requesting relief that protects those interests is precisely the role the United States should be expected to play in these circumstances.

B. The United States Is Not Limited To Seeking Declaratory And Injunctive Relief Against New Mexico Based Solely On The 1906 Treaty And Non-Compact Laws

1. New Mexico (Reply Br. 12-18) and Colorado (Reply Br. 4-6) contend that the United States' ability to protect its treaty and reclamation obligations at stake in this case can only be based on the general authority of the United States to seek relief in equity to protect its interest in treaty compliance or to prevent violations of reclamation law, and cannot be based on the Compact. The Court should reject that argument.

In its complaint, the United States did not draw a distinction between claims based upon the Compact and claims based upon other laws. That distinction is at issue now because the Master structured his Report in a way that differentiates between claims based on alleged violations of the Compact and claims under federal reclamation law. Rep. 229-237. As a result, the United States demonstrated in its brief in support of its exception that it may seek declaratory and injunctive relief against New Mexico for violations of the Compact—a

federal law that protects distinct federal interests (i) in administering the Project that is the vehicle for accomplishing the Compact's equitable apportionment, and (ii) in complying with the United States' contract and treaty obligations. U.S. Exception Br. 34-40 (discussing *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), and *United States* v. *County of Arlington*, 669 F.2d 925 (4th Cir.), appeal dismissed and cert. denied, 459 U.S. 801 (1982)). The Compact imposes obligations upon New Mexico that protect those federal interests, and it is thus appropriate for the United States to base its claims for injunctive relief on New Mexico's alleged violations of the Compact.

New Mexico contends (Reply Br. 13) that the United States' reliance on *Sanitary District of Chicago* is misplaced because the United States in that case sought to enjoin the defendant from taking water in violation of a federal permit, not an interstate compact. That distinction makes no difference. In *Sanitary District of Chicago*, the defendant's use of water in excess of the permit threatened navigability of a channel from Lake Michigan to the Des Plaines River and implicated treaty obligations of the United States. 266 U.S. at 423-425. The Court held that the United States could obtain relief enjoining the defendant from exceeding the authorized permit withdrawals in order to protect those federal interests, even if no federal statute specifically authorized the suit. *Id.* at 425-426. Here, the United States likewise needs no specific authorization to seek injunctive relief to prevent New Mexico from violating its obligations under the Compact—a federal statute that similarly protects federal interests, including treaty obligations.

New Mexico contends (Reply Br. 12, 18) that the United States "has always been able" to bring a claim based on the 1906 Treaty or reclamation law to protect its operation of the Project and its treaty and contract obligations. In New Mexico's view, the United States therefore need not rely on the Compact. And it implies (*id.* at 14) that the defendants to such an enforcement action—at least one based on interference with the United States' treaty obligation—would be the "water users * * * impairing [the] treaty obligation," rather than the State. That suggestion underscores why the Court should not rule out the United States' ability to seek declaratory and injunctive relief against New Mexico based on its violations of the Compact, which obligates the State to prevent its water users from interfering with Project deliveries that carry out the Compact's equitable apportionment. See U.S. Reply Br. 8-9; see also Rep. 200-201, 213.

2. Alternatively, New Mexico (Reply Br. 16-18) and Colorado (Reply Br. 6-7) dispute that the Compact is a federal statute that protects federal interests. According to New Mexico (Reply Br. 16-17), the Compact—and specifically Article IV, which requires New Mexico to deliver water to Elephant Butte Reservoir, 53 Stat. 788—is "silent regarding the United States' operations of the Project after delivery to Elephant Butte Reservoir." See N.M. Reply Br. 17 ("Article IV says nothing about Project operations, or specific uses of water below Elephant Butte."). That argument is incorrect.

As the United States has explained, the Compact protects the Project's operations. U.S. Exception Br. 33-40. In the Compact, the States (i) incorporated and relied upon an existing reclamation project to deliver

Texas's and part of New Mexico's equitable apportionment, Rep. 203-209; (ii) recognized that the Project also had an international treaty obligation to deliver water to Mexico, Compact, Art. XVI, 53 Stat. 792; (iii) agreed that New Mexico would deliver a specific quantity of water to the Project, *id.* Art. IV, 53 Stat. 788; and (iv) defined the water stored in the Project as "[u]sable [w]ater" that is "available for release in accordance with irrigation demands, including deliveries to Mexico," *id.* Art. I(k) and (*l*), 53 Stat. 786.

Thus, as the Master recognized, the Compact identifies what is to be done with water that is delivered by New Mexico to Elephant Butte Reservoir, and the Compact "protects the water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200. Indeed, if the Compact did not prohibit New Mexico water users from interfering with Project deliveries, then "the question of Texas's equitable apportionment" under the Compact would be "an open, major source of controversy," contrary to the basic purpose of the Compact to "effect[] an equitable apportionment of" the waters of the Rio Grande above Fort Quitman, Texas. Rep. 202-203 (quoting Compact Preamble, 53 Stat. 785); see Rep. 203 (The Compact "unambiguously protect[s] the administration of the * * * Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments" of Rio Grande water.). Because the Compact protects the Project's operations, the United States can obtain declaratory and injunctive relief when those operations are threatened by Compact violations.

3. New Mexico's resistance (Reply Br. 24-25) to the United States' ability to seek relief based on the Com-

pact appears to be based on the idea, shared by Colorado (Exceptions Br. 8), that the United States should not be permitted to "tak[e] positions or assert[] theories at odds with the positions and claims of the actual compacting parties" when it intervenes in an interstate compact dispute. N.M. Reply Br. 25. That view is unsound. The United States has agreed to submit to this Court's jurisdiction and participate in this suit as a party, and in so doing it has agreed to be bound by the Court's interpretation of the Compact. The whole point of intervention is to protect the distinct federal interests at stake in this dispute over the scope of New Mexico's obligations under the Compact, and the United States must be permitted to request relief from the Court that protects those interests. The Compact incorporates and relies upon a reclamation project to carry out its equitable apportionment framework, and the United States is not required to remain silent while the States present arguments on how the United States should operate its Project.

C. The United States May Enforce The Compact As A Third-Party Beneficiary

For the same reasons that the United States has a right to enforce the statutory protections in the Compact, the United States has enforceable rights under principles of contract law as a third-party beneficiary. U.S. Exception Br. 46-48. New Mexico (Reply Br. 29-32) and Colorado (Reply Br. 10-13) dispute that the United States is a third-party beneficiary with interests protected by the Compact. They contend (N.M. Reply Br. 29-31; Colo. Reply Br. 11-12) that the purpose of the Compact is to benefit the States, not the United States. But the fact that Texas benefits from New Mexico's

promise to deliver water to the Project under the Compact does not mean that the United States' interests in the Project and its ability to fulfill its obligation to make deliveries of water to Mexico, Texas, and lower New Mexico are not also protected by the Compact.

New Mexico (Reply Br. 29-31) and Colorado (Reply Br. 12-13) further contend that the Compact does not reflect any express or implied intention of the States to benefit the United States. But for all the reasons the Compact is a federal law that protects the Project, see pp. 12-13, *supra*, the Compact reflects an intention to benefit the United States. See Restatement (Second) of Contracts § 302(1)(b) (1981) (intent to benefit a third party may be inferred from the circumstances). The Compact language, and specifically Article I(*l*)'s description of usable water that New Mexico delivers to the Project, reflects the parties' understanding that water delivered by New Mexico to Elephant Butte Reservoir will be available for release by Reclamation "in accordance with irrigation demands, including deliveries to Mexico." 53 Stat. 786. That language demonstrates that the parties intended to protect the Project's operations and its preexisting commitments, including the United States' treaty obligation.

Moreover, the "structure of the performance required under the [Compact]" provides further indicia of the States' intent to benefit the United States. See *Public Serv. Co. of N.H.* v. *Hudson Light & Power Dep't*, 938 F.2d 338, 342 (1st Cir. 1991) (emphasis omitted). The Compact requires New Mexico to perform its duties by delivering water to the Project, which is responsible for releasing water to fulfill Texas's equitable apportionment and the United States' treaty obligations. By requiring New Mexico to deliver water directly to

the Project, the structure of the Compact thus enables the United States to satisfy those obligations. New Mexico (Reply Br. 30) and Colorado (Reply Br. 11) contend that the Compact was meant only to "reflect the *status quo*" with respect to the Project and not to give the United States any additional benefits. But it is the embodiment of the "status quo" into a compact legally binding on the States that confers a benefit on the United States and protects its ability to carry out the Project's obligations. See p. 12, *supra*.

D. Intervention By The United States Is Not An Improper Attempt To Circumvent State Law

New Mexico contends (Reply Br. 32-36) that the United States' request for declaratory and injunctive relief based on the Compact signifies that the United States is attempting "to circumvent New Mexico law" and the rulings of a New Mexico state court that is presiding over a general adjudication of Rio Grande water rights between Elephant Butte Reservoir and the New Mexico-Texas state line. See U.S. Exception Br. 17-20 (describing state water adjudication). That contention should be rejected.

As the United States explained in its reply brief to the exceptions filed by New Mexico and Colorado, the rulings of the New Mexico state court, which has held that it does not have jurisdiction to adjudicate a specific quantity of water for delivery to Texas as part of the Project's water right and has not recognized the Project's right to deliver water to Mexico, see U.S. Reply Br. 11, highlight the need for this Court to protect Texas's equitable apportionment under the Compact and the protection under the Compact for the United States' treaty obligation. Once those issues are determined in these proceedings, the New Mexico state court

must respect those rulings as it adjudicates water rights in the New Mexico portion of the Rio Grande Basin. See Rep. 216. New Mexico cites (Reply Br. 33, 37) *California* v. *United States*, 438 U.S. 645 (1978), for the proposition that the United States' water rights are properly determined under state law. But the Court made clear in that case that Section 8 of the Reclamation Act, Act of June 17, 1902, ch. 1093, 32 Stat. 390, does not override other specific directives of Congress. See *California* v. *United States*, 438 U.S. at 668 n.21, 672 n.25, 670-679. Although the Project's water right in New Mexico is governed by state law as a general matter, the Compact is a federal law that has independent legal force and would override any state law regulating or allowing the diversion or distribution of water that conflicts with the Compact's equitable apportionment.

By resolving questions of compact interpretation in this original action, this Court would not "step into the [state water adjudication] court's role," as New Mexico contends (Reply Br. 35), nor determine the relationship between the Project's water right and those of New Mexico citizens under New Mexico law. The role of this Court is to define the protections for the apportionment of water for Texas and lower New Mexico and the United States' treaty obligations provided under the Compact. Those rulings will then set certain federal parameters for the New Mexico water adjudication. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (an apportionment of water in an interstate compact is "binding upon the citizens of each State and all water claimants").

* * * * *

For the foregoing reasons and those stated in the brief of the United States in support of its exception, the exception of the United States should be sustained.

Respectfully submitted.

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Acting Solicitor General

SEPTEMBER 2017